IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE.

APPEAL FROM ORDER No. 909 OF 2003. .

Varden T. James. ..Appellants.

vs.

Farhang Azhar. ..Respondents.

Shri M.S. Bhandari i/b Shri Saeed Akhtar and Shri Johnson John for the appellant.

Shri D.H. Mehta with P.K.Samdhani i/b Prakash & Co. for respondent No.1 and co-respondents.

CORAM: V.C.DAGA,J.
DATED: 1.10.2004.

JUDGMENT:

. This appeal is directed against the order dated 15th September 2003 passed in the Notice of Motion No. 2892/2003 in S.C. Suit No. 3517 of 2003 by the City Civil Court, Bombay, directing return of plaint under Order VIII Rule 10 while adjudicating upon the question raised under section 9-A of the Code of Civil Procedure ('the C.P.C.' for short), and thereby holding that it had no jurisdiction to entertain and try the suit in question.

The Facts:

2. The dispute relates to the shop premises bearing

Nos. 16 and 17 situate at the junction of St. John's Street and Pali Road, Bandra (E), Mumbai- 400 050 ('the suit premises' for short).

3. The suit premises are admittedly owned by the plaintiff. The plaintiff claims to have given it to the defendant for conducting business under an agreement dated 17.3.2001. As per the said agreement, the defendant was to conduct business in the suit premises from 16.3.2001 till 15.3.2004.

4. According to the plaintiff from 25.11.2002, the defendant had closed his shop and stopped doing business. He had removed his furniture and fixtures. He had also stopped paying monthly conducting charges to the plaintiff. The plaintiff claims to have received possession of the shop premises in the month of January 2003. However, on 19.7.2003 the plaintiff claims to have noticed that the defendant has committed trespass in the suit premises. According to the plaintiff the arrears of conducting charges from November 2002 till the date of filing of the suit have also not been paid by the defendant.

5. The defendant however, disputes the case sought to be made by the plaintiff. According to him, he has always been in possession of the suit premises and

that he has spent considerable amount on the suit premises for its development. He further contends that as per the conducting agreement the period of the agreement did not expire since he had exercised option to renew it for further period of 3 years as the renewal was at his option as such he claimed to be entitle to conduct business for such extended period i.e. upto 15.3.2007.

6. The plaintiff had taken out Notice of Motion No.3517 of 2003 for interim relief in terms of prayers incorporated therein. The trial Court vide its order dated 31.7.2003 refused to grant any interim relief. The plaintiff carried appeal from order dated 31.7.2003 to this Court in A.O. No. 909 of 2003. The learned Single Judge vide its order dated 9th December, 2003 was pleased to appoint Court Receiver, High Court, Bombay, as receiver of the suit property and directed appointment of the defendant as agent of the Court Receiver on usual terms of the agency agreement read with the terms of the conducting agreement. However, amount of royalty is yet to be determined by the Court Receiver.

7. The trial Court, during the pendency of the Notice

of Motion, framed preliminary issue so as to decide the question of its own jurisdiction raised under section 9-A of the C.P.C. The preliminary issue came to be tried. The parties to the suit appears to have persuaded the trial Court to decide question of jurisdiction on the basis of rival affidavits without recording any evidence.

8. The trial Court while considering the issue of its own jurisdiction, relying on the judgment of the learned Single Judge (Karnik,J.) of this Court in the case of Sagir Ahmed Nanhe vs. Maria Pleadade Gonsalves, 2003 (2) All. M.R. 554, vide its order dated 10.9.2003, held that it had no jurisdiction to entertain and try the suit and directed return of plaint under O. VII Rule 10 of the C.P.C. This order is a subject matter of challenge in this appeal from order.

Submissions:

9. Learned Counsel appearing for the appellant submits that the learned trial Court erred in holding that there was an element of licence for use of the premises, as such the suit would be within the

jurisdiction of the Court of Small Causes. He submits that the trial Court ought to have seen that the plaintiff was not seeking eviction of the defendant from the suit premises. He further submits that plaintiff had taken possession of the suit premises on 21.3.2003 and was seeking restoration of possession of the suit premises within 6 months of his forcible dispossession as such suit ought to have been treated as a suit filed under section 6 of the Specific Relief Act. He further submits that the findings recorded by the trial Court are self contradictory as such unsustainable in law.

10. Learned Counsel for the appellant has further urged that the judgment of the learned Single Judge of this Court in the case of Sagir Ahmed (supra) came to be decided on the facts of that particular case. It cannot be an authority to decide issues involved in the case at hand. He submits that in the case of Sagir Ahmed (supra),learned Single Judge ruled that such a suit was of civil nature, however, the valuation of the suit being below Rs.10,000/- it was held that the suit would fall within the jurisdiction of the Small Causes Court. As such, in his submission, reliance placed on the said judgment by

the trial Court is misplaced.

11. Learned Counsel for the appellant placed reliance on the two judgments of the two learned Single Judges of this Court; one, in the case of Smt.Anusaya Narayanrao Ghate vs. Smt. Maktumbi A. Nadaf 1999 (2) B.C.R. 374 and, another, in the case of Mokhamed Pasiat vs. Ibrahim Hasan, C.R. A. No. 132 of 1981 decided on 6.8. 1982 (Unreported) to contend that the jurisdiction to try the suit of the nature involved herein lies with the civil Court i.e. Bombay City Civil Court at Mumbai. He further submits that the question of valuation of the suit has also been wrongly decided by the trial Court. He, thus, prayed that the impugned judgement and order of the trial Court be set aside and his appeal be allowed.

12. Per contra, Shri Samdhani, learned Counsel appearing for the respondent tried to support the impugned order. He submitted that a bare perusal of the conducting agreement establishes that the dominant intention was to allow the conductor to use the premises while using licence for running business, though the agreement is couched to suggest that it is business of the plaintiff, which was to be conducted

by the defendant. However, in his submission,the terms like deposit of Rs. 3 lacs (Clause 5), purchasing goods by the defendant in his own name (Clause 8) not to effect any additions or alterations in the premises (Clause 11), removal of employees from the premises and handing over possession of the premises go to show that the dominant intention was to allow use of the premise as a licensee. He submits that the defendant did not carry on business for or on account of the plaintiff, but as his own business on his own account. Thus, according to Shri Samdhani, true construction of the document would indicate that it is a transaction of a licence and the licencee has been granted to the defendant by the plaintiff to use the suit premises. According to him, the licence is defined under section 52 of the Easement Act. In his submission, the present transaction falls within the sweep of section 52, as the plaintiff has granted "a right"to the defendant to enter upon the premises and to conduct business therein. He pressed into service Black’s law Dictionary which defines the phrase " conducting". He also relied upon the general observations appearing in para 4 of the judgment of this Court in the case of Ratanlal Bhati vs. Himmatlal Parihar reported in 1987 (1) BCR 458 to

contend that the defendant is not a mere conductor of the business, and, hence, is not excepted from the general category of licensee sought to be covered by section 41(1) of the Presidency Small Causes Court Act, 1882, as amended in 1976. He submits that the said section begins with a‘non-obstante clause’ and covers all suits between a licensor and a licensee relating to the recovery of possession of any immovable property . It is further submitted that the expression "all suits" between a licensor and a licensee relating to recovery of possession of any immovable property are expressions of wide import and cover all proceedings between licensor and licensee wherever recovery of possession of any immovable property is involved. He also placed reliance on the judgment of Supreme Court in the case of Mansukhlal Jain vs. Eknath Ogale, AIR 1995 SC 1102.

13. Shri Samdhani further submitted that prayer clause (b) though couched in the form of a mandatory relief, is nothing but in reality a prayer for possession. He placed reliance on the judgment of the Division Bench of this Court in the case of Nagin Dagli vs. Haribhai Patel reported in AIR 1980 Bom.123. He submits that only the Court of Small

Causes under section 41 has exclusive jurisdiction to try the suit in question.

14. It is submitted by Shri Samdhani, that the even otherwise, the City Civil Court has no jurisdiction inasmuch as the suit filed by the plaintiff is a suit for possession based on title and not on termination of the conducting agreement. He tried to highlight the case of the plaintiff which makes out as case that the defendant has trespassed after plaintiff had taken over possession of the suit premises. In his submission, if this be the case, then it is nothing but a suit for possession based on title. If it is a suit for possession, it is required to be valued, as per prevailing market value which is bound to be more than Rs.50,000/-, he thus, submits that the suit is beyond the pecuniary jurisdiction of the City Civil Court.

15. It is also submitted that the suit in any event, would be covered by section 6(iv)(d) which covers suits for declaration with respect to any "right" . He submitted that the suit is, thus required to be valued, in accordance with the formula of valuation laid down by the Full Bench of this Court in the case

of Prem Ratan vs. Lalitkumar Kakhani reported in AIR 1988 Bom.264. He thus, prayed for dismissal of this appeal from order with costs.

Consideration:

16. The trial Court has directed return of the plaint under Order 7 Rule 10 of the C.P.C., considering the question of jurisdiction raised under section 9A of the C.P.C. The basis of the impugned order is the judgment of the learned Single Judge (Karnik,J.) of this Court in the case of Sagir Ahmed (cited supra) ; wherein the learned Single Judge observed that the suit to claim possession of the running business is not excluded from cognizance of the Small Causes Court under sub-section (d) of section 19. The said observation appears to have misled the trial Court. It cannot be ignored that the learned Single Judge was considering a suit which was valued at Rs. 1,000/- much below the pecuniary jurisdiction of the Court of Small Causes i.e. Rs.10,000/-. Section 18 lays down that subject to exception mentioned in section 19, the Small Causes Court shall have jurisdiction to try all suits of civil nature where valuation of subject matter is below Rs.10,000/-. Thus, all suits of civil

nature valued below Rs.10,000/- are within the jurisdiction of the Small Causes Court, as such required to be tried by the Small Causes Court only.

17. The learned Single Judge in the case of Sagir Ahmed (supra) has rightly observed that, since valuation of the suit did not exceed Rs.10,000/-; it was unnecessary for him to consider other issue as to whether suit is of civil nature or otherwise. Therefore,the said judgment of the learned Single Judge cannot be an authority to hold that all suits seeking possession of running business would lie within the jurisdiction of the Small Causes Court. Thus, the approach adopted and the finding recorded by the trial Court is unsustainable.

18. Let me consider the case from twin angles. Firstly, the case of the plaintiff was that the agreement clearly shows that it was an agreement for conducting business as defendant was only a licensee. It was an arrangement for the defendant to hold possession as licensee and on termination of licence the defendant was liable to be evicted. There was and is no protection to the defendant under Rent

Legislation. A conductor of running business of a licensor is excluded from the purview of the Rent Legislation as such the civil suit in the civil Court was the only remedy available to the plaintiff. Considering from another angle, the defendant was permitted to run business of the licensor. It was only a personal right or previlage given to the defendant, as understood in common law to do something permitted by the owner of the running business i.e. permission to conduct or run business. The premises was handed over to the defendant merely as an incident of main contract of conducting business. The dominant agreement of the parties is of conducting business. In cases where the party who had entered into an agreement giving his business to another wants to take possession on the expiry of the time, his remedy is to file suit in civil Court and not by approaching the Small Causes Court under section 41 of the Small Causes Court Act, 1980. Therefore, the suit was rightly filed in the City Civil Court at Mumbai (See 1998(5) Bom.C.R. 686(690).

19. The trial Court has also gone to the extent of observing that the plaintiff had claimed Rs.40,000/- for 2 months as arrears of conducting charges and

interest thereon, as such the valuation of the suit claim is bound to exceed the pecuniary jurisdiction of the trial Court. The finding recorded in this behalf is also unsustainable in view of the pleading in para 11 of the plaint, which unequivocally pleads that the defendant failed to pay to the plaintiff an amount of Rs.40,000/- for conducting restaurant business from 3rd November 2002 to 21st January 2003 and has closed down the business thereafter. The basis of the trial Court for calculation of the suit claim is based on the claims set up in the suit in the sum of Rs.40,000/-, said to be the arrears of conducting charges for 2 months, which, in my opinion, is unsustainable. The trial Court could not have taken Rs. 40,000/- i.e. arrears of conducting charges for two months as a basis to arrive at monthly income so as to hold that yearly income would exceed the pecuniary jurisdiction of the trial Court. The quantum of income will always dependent on the business turn over as mentioned in the conducting agreement and so many other factors requiring deduction therefrom such as number of taxes levied thereof with other expenses.

20. In order to ascertain valuation of the suit, it

is necessary to find out share of the plaintiff in the monthly income of the business of which possession was sought by the plaintiff and to allow permissible deductions therefrom. In the circumstances, in my view, the trial Court could not have straightway jumped to the conclusion that income for two months being Rs.4,000/- yearly income has to be beyond Rs. 50,000/- as such suit claim is bound to travel beyond the pecuniary jurisdiction of the trial Court.

21. The trial Court without recording any finding in this behalf could not have recorded any finding with respect to the valuation of the suit. The valuation of the suit in question depends upon the market value of the suit property to be calculated as per law laid down by this Court in this behalf from time to time. If the income is not fixed, if the income is fluctuating, if it depends upon turnover then it is required to be ascertained in an enquiry to be conducted under section 8 of the Bombay Court Fees Act. For that purpose, it was necessary to permit the parties to lead evidence then only correct conclusion based on evidence could be drawn as to whether or not the suit is within the jurisdiction of the City Civil Court.

22. It is now well settled that one of the modes of valuation of the property in suit is on the basis of income it fetches. If it is a civil right capable of quantified in terms of money, then it has to be valued as per the settled norms of valuation of such right. In the instant case, worth of right to claim possession of running business will have to be calculated on the basis of net income it fetches. The Court may take judicial notice that of certain statutory deductions in the nature of various taxes, while calculating net income and may multiply it with suitable multiplier to find out value of such right in terms of money. If it is not capable of valuation in terms of money, then one may take notional valuation thereof.

23. In the above view of the matter, the impugned order needs to be set aside and the matter needs to be remitted back to the trial Court with direction to frame all issues including an issue relating to the pecuniary jurisdiction of the trial Court as one of the issues. However, the trial Court, if finds that the suit can be disposed of on an issue relating to the pecuniary jurisdiction of the Court, then, in

exercise of its discretion it may postpone framing of other issues.

24. Thus, while confirming the jurisdiction of the civil Court, the matter is remitted back to the trial Court for decision afresh as per observations made hereinabove.

25. So far as modification of the interim relief is concerned, the appointment of Court Receiver on the suit property shall continue. However, the defendant cannot be allowed to act as an agent of the Court Receiver because he has no prima facie; right to remain in possession of running business especially after expiry of the period of license, which expired on 15.3.2004, during the pendency of the suit. The plaintiff prima faice; could not have exercised his option to renew as the said option to renew for a further period of 3 years was to become available on or after 15.3.204 but before this date could arrive plaintiff chose to file suit as such there was no occasion for the defendant to exercise that option of 1st renewal of licence. The licence shall stand revoked with the filing of the suit. The said personal privilege came to an end on 24.7.2003; when

suit was filed in the City Civil Court, Mumbai.

26. In the above view of the matter, interim order passed by the learned Single Judge of this Court dated 31.7.2003 A.O. No.909 of 2003 is being modified by this Court so far as the right of the defendant to act as agent of the Court Receiver is concerned. The Court Receiver is directed to appoint plaintiff as his agent with immediate effect i.e. from 1st October 2004 and the defendant is injuncted by an order of injunction from interfering with the possession and occupation of the plaintiff as agent of the Court Receiver. The observations made so far as modification of the interim order is concerned, they are prima facie.

27. In the result, impugned order is set aside. Appeal is allowed in terms of this order with no order as to costs.

28. At this stage, learned Counsel for the respondent prayed for stay of effect and operation of this order. Considering the issues involved and after hearing the parties, effect and operation of this order is stayed for a period of 8 weeks from today. However, in the

meanwhile, respondent shall not create any third party interest in the suit property.